(1) No. 89-1391

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DR. IRVING RUST, on behalf of himself, his patients, and all others similarly situated, DR. MELVIN PADAWER, on behalf of himself, his patients, and all others similarly situated, MEDICAL AND HEALTH RESEARCH ASSOCIATION OF NEW YORK CITY, INC., PLANNED PARENTHOOD OF NEW YORK CITY, INC., PLANNED PARENTHOOD OF WESTCHESTER/ ROCKLAND, and HEALTH SERVICES OF HUDSON COUNTY, NEW JERSEY,

Petitioners,

—v.—

DR. LOUIS SULLIVAN, or his successor, Secretary of the United States Department of Health and Human Services,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether regulations promulgated under Title X of the Public Health Service Act that prohibit abortion counseling, information, and referral in federally funded family planning programs, while simultaneously requiring the provision of information to "protect the health of . . . [the] unborn child" and referral to prenatal care providers that "promote the welfare of . . . [the] unborn child," impermissibly discriminate on the basis of viewpoint in violation of the First Amendment.

2. Whether regulations that require physical as well as financial separation between services provided by and those prohibited under Title X, as construed by the Department of Health and Human Services, impermissibly burden the ability of petitioners to provide abortion counseling, information, and referral with non-Title X funds in violation of the First Amendment.

3. Whether regulations that require health professionals working in Title X programs to provide their patients with incomplete and medically inappropriate information regarding a subject crucial to an informed choice between terminating a pregnancy and carrying it to term violate the Fifth Amendment.

4. Whether regulations that prohibit abortion counseling, information, and referral in Title X programs and require such programs to be physically as well as financially separate from these newly "prohibited" activities, as determined by the Secretary, are consistent with the language and intent of Title X and are otherwise within the Secretary's authority.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Second Circuit are those in the caption (appellants in C.A. No. 88-6206) as well as the State of New York, the City of New York, and the New York City Health & Hospitals Corporation (appellants in C.A. No. 88-6204). The three governmental appellants in C.A. No. 88-6204 petition separately for certiorari.

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Petitioners herein respectfully pray that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Second Circuit entered on November 1, 1989.

OPINIONS BELOW

The decision of the district court is reported at 690 F. Supp. 1261 (S.D.N.Y. 1988) (9-32a).[1] The decision of the court of appeals is reported at 889 F.2d 401 (2d Cir. 1989) (35-67a). The Second Circuit granted an injunction pending review on certiorari by this Court on November 21, 1989 (68-69a).

BASIS FOR JURISDICTION

The final judgment of the court of appeals was entered on November 1, 1989. On January 11, 1990, Justice Marshall signed an order extending the time to file a petition for certiorari to and including March 1, 1990. This Court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C.A. § 1254(1) (West Supp. 1989).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law . . . abridging the freedom of speech . . . .

United States Constitution, Amendment V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

1 The opinion is reprinted in the Appendix to Petitions for Writ of Certiorari. For the convenience of the Court, a single appendix accompanies the petition of Dr. Irving Rust *et al.* and the separate petition of the State of New York *et al.* Citations to this Appendix are made to the page number therein as "(_____a)." Citations to other materials in the record below will be to "(_____A)" (referring to the joint appendix filed in the Second Circuit) or by name and date of document, if in the record but not included in either appendix. All references to affidavits and declarations in the record will be to "Name ¶ _____" with appendix page, if any.

Title X of the Public Health Service Act, 42 U.S.C. § 300(a) (1982):

> The Secretary is authorized to make grants to and enter into contracts . . . to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services . . . .

Title X of the Public Health Service Act, 42 U.S.C. § 300a-6 (1982):

> None of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning.

Grants for Family Planning Services, 42 C.F.R. §§ 59.2, 59.5, 59.7, 59.8, 59.9, 59.10 (text appears at 1-8a).

STATEMENT OF THE CASE

A. The Title X Program and the Challenged Regulations

Title X of the Public Health Service Act, 42 U.S.C. §§ 300-300a-41 (1982) ("Title X" or "the Act"), subsidizes the creation and operation of clinical programs providing critical medical services to a desperately needy population in New York State[2] and across the nation.[3] Though the areas

2 Petitioner Medical and Health Research Association of New York City ("MHRA") is one of two direct grantees of Title X funds in New York State. Fink ¶ 3 (533A); Gesche ¶ 4 (75a). The New York State Department of Health ("NYSDOH") is the other direct grantee. Gesche ¶ 4 (75a). Together, MHRA and NYSDOH subgrant Title X funds in excess of $8 million to 40 delegate agencies statewide. Gesche ¶¶ 4-5 (544-45A); Fink ¶ 4 (533-34A). Petitioners Planned Parenthood of New York City, Inc., Planned Parenthood of Westchester/Rockland, and Health Services of Hudson County, New Jersey, are among these delegate agencies. Doctors Rust and Padawer are medical directors at provider agencies.

3 Title X is the largest source of federal support for family planning and reproductive health care, funding over 3900 clinics nationwide and serving nearly five million low-income women per year. *See* Morley ¶ 6 (78-79a). The overwhelming majority of these women are poor, most having incomes below 150% of the poverty line, Fink ¶ 3 (533A); Gesche ¶ 6 (545A); a sub-

served by the program have an acute need for medical care and information,[4] Title X clinics are frequently the only providers of reproductive health care or even of basic medical services for low-income women living in these communities. United States Department of Health and Human Services, *Program Guidelines for Project Grants for Family Planning Services* § 9.4 (1981) (hereinafter "1981 Guidelines") (39A); *see* Fink ¶ 10 (85a); Drisgula ¶ 18 (89a); Potteiger ¶ 16 (91a); Tiezzi ¶ 8a (726-27A).

Recognizing that Title X projects would be the "frontline" in the battle against disease, Congress intended clinics receiving Title X funds to function as an entry point into the health care system, by identifying undiscovered health problems and by offering referrals for all treatment needs. *See* 116 Cong. Rec. 37,370 (1970) (statement of Rep. Bush) (222A); *see generally infra* Point III(A). For this reason, the Department of Health and Human Services ("HHS") requires Title X clinics to provide general medical care[5] and

stantial percentage are adolescents, Gesche ¶ 7 (over 30%) (545A); and many are Black or Hispanic, *e.g.*, Fink ¶ 3 (533A); Rust ¶ 5 (699-700A).

4 The communities served by the program suffer from disproportionately high rates of teenage pregnancy, infant mortality, and sexually transmitted disease. Joseph ¶¶ 2-3 (613-14A); Bennett ¶ 7 (496A); Coombs ¶ 10 (Nov. 10, 1989); Moran ¶ 4 (Feb. 5, 1988). In the urban areas served by New York providers, the percentage of those infected with AIDS is among the highest in the nation. *See* Joseph ¶¶ 7-8 (611A); Minkoff ¶¶ 5-6 (647A). One in every 60 women giving birth in New York City is HIV-infected, with the rate rising to one in 50 in Manhattan and the Bronx. Gesche (Exh. F) (New York State Department of Health, *Newborn Seroprevalence Study* (1988)) (563A). Thirty to fifty percent of the children born to these women will be infected. *Id.* In New York State, in 1988 alone, 2300 HIV-positive women were expected to give birth, with approximately 1000 of those infants being infected by the virus. Gesche ¶ 17 (549-50A).

5 The most recent Title X guidelines, for example, require clinics to provide a general physical examination that includes an examination of blood pressure, thyroid, heart, lungs, and breasts (with self-exam instruction). 1981 Guidelines at § 8.3 (35-36A). Clinics must also provide diagnostic tests such as pap smears and gonorrhea cultures, *id.*, and offer counseling, education, and referral for AIDS. *See* Memorandum from Nabers Cabaniss, Deputy Assistant Secretary for Population Affairs, to Regional Health Administrators (Dec. 8, 1987) (Exh. G to Complaint, *Rust v. Bowen*, 690

referral for all services not provided by the clinic, in addition to basic family planning services. *See* 42 C.F.R. § 59.5(b)(1) (1988); *see infra* Point III. These requirements continue to date.

On February 2, 1988, HHS promulgated amendments to then current Title X regulations purporting to interpret and implement § 1008 of the Act.[6] *But see infra* Point III. While retaining the requirements described above, these new regulations fundamentally alter the nature of the Title X program by singling out pregnancy as the only condition for which medical care, advice, and information is sharply restricted.[7]

Specifically, § 59.8 of the regulations prohibits Title X projects from providing a pregnant woman, regardless of her life or medical circumstances, with "counseling concerning the use of abortion . . . or . . . referral for abortion." § 59.8(a)(1), (3a). The projects are required, however, to furnish every pregnant woman with a list of all prenatal care providers that "promote the welfare of . . . [the] unborn child."[8] § 59.8(a)(2), (b)(4), (3-4a). The list must include all

F. Supp. 1261 (S.D.N.Y. 1988) (No. 88-0702)). Recommended services include treatment for minor gynecologic problems, genetic screening and referral, and general "health maintenance services . . . directed toward health promotion and disease prevention." 1981 Guidelines at §§ 9.1-3, 9.4 (39A). The 1981 Guidelines also specifically required abortion counseling and referral as well as counseling and referral for adoption and prenatal care services. *Id.* at § 8.6 (71a).

6 Section 1008, codified at 42 U.S.C. § 300a-6, excludes "abortion . . . as a method of family planning" from the broad range of services funded. *See infra* Point III(A).

7 Pregnancy is one of the most prevalent conditions to be diagnosed and discussed at Title X clinics. Indeed, one of the reasons most frequently given for an initial visit to a Title X clinic is a "pregnancy scare." Bennett ¶ 11 (498A); Drisgula ¶ 8 (513A).

8 The only exception to the mandatory referral for prenatal care arises when "emergency care is required," at which time "the Title X project shall be required only to refer the client immediately to an appropriate provider of emergency medical services." § 59.8(a)(2), (3a). The exception applies only where continued pregnancy would be life-threatening. *E.g.*, 53 Fed. Reg.

"providers who do not perform abortions" but exclude those "whose principle business is the provision of abortions."[9] § 59.8(a)(3), (b)(3), (b)(4), (3-4a). Regardless of whether the patient is thirteen years old, a victim of rape, or infected with AIDS,[10] the Title X health care professional "must" provide her "with information necessary to protect the health of . . . [the] unborn child." § 59.8(a)(2), (3a). Many patients do not know that abortion is a safe, legal option. Drisgula ¶ 20 (518A); S. White ¶ 13 (87a); Merrens ¶ 15 (95a).[11] However, even if a patient knows that abortion is an option and asks for information about the procedure or its availability,[12] the Title X physician or counselor is constrained from saying more than that "the project does not consider abortion an

2922, 2937 (1988) (preamble to regulations) ("Title X providers are in fact obligated to provide referrals for immediate and appropriate medical care when confronted with a *life-threatening* medical condition.") (emphasis added) (332A).

9 This requirement effectively eliminates most abortion providers by excluding from the list all providers that would be accessible and affordable to low-income women. Henshaw ¶¶ 3-4 (82a). Seventy percent of abortions nationally and 73.5% of those in New York are performed at clinics that might be considered to "principally" provide abortions. Henshaw ¶ 4 (82a). Only hospitals, which are geographically or economically inaccessible, and private practitioners, who generally do not accept Medicaid or provide reduced-cost care, could be included on the list. Drisgula ¶ 28 (520A); Gordon ¶ 7 (587-88A). Moreover, the Title X physician is prohibited from identifying those providers on the list, if any, that perform abortions. *See* § 59.8(a)(3), (3a).

10 One rural project estimated that in a single year it referred for abortion five 10-14 year-old girls, at least one or two women with AIDS, and one or two women who had been raped. Potteiger ¶¶ 9-10 (Dec. 15, 1987). Another rural program reported 15 patients in one year whose pregnancy resulted from rape. Drisgula ¶ 24 (90a).

11 This lack of information and education about abortion is vividly illustrated by petitioner Dr. Rust's relatively recent encounter with a patient in the South Bronx who had tried to self-abort because "she didn't know that she could obtain an abortion, or where information about abortions was available." Rust ¶ 15 (92a).

12 At some Title X programs as many as 72% of patients diagnosed as pregnant request referrals for abortion services. Klepper ¶ 17 (Feb. 5, 1988).

appropriate method of family planning . . . and that [it] can help her to obtain prenatal care and necessary social services . . . ." § 59.8(b)(5), (5a).

Further, § 59.10 prohibits activities that "encourage, promote or advocate abortion." (6a). This prohibition extends so far as to bar clinics from making appointments for pregnant clients with abortion clinics, § 59.10(b)(2), (6a); offering clients a pamphlet, § 59.10(b)(1), (6a), or even a section of the yellow pages advertising a facility providing abortions, *see New York v. Sullivan* (Cardamone, J., concurring) (61a); (Kearse, J., dissenting) (64-65a); making available books that describe the abortion procedure, § 59.10(a)(5), (6a); or discussing abortion in lectures or workshops on sex education, family planning, or reproductive health, § 59.10(a)(2), (6a). Section 59.10 thus prevents Title X recipients from engaging in any nonpejorative discussion of abortion.

Finally, § 59.9 requires Title X programs to be "physically and financially separate" from "prohibited" activities. (5a). The existence of separate Title X and non-Title X personnel, as well as of separate treatment, consultation, examination, and waiting rooms, is to be considered in determining the "integrity and independence" of Title X projects. § 59.9(a)-(d), (5-6a). The requirement is so severe that it will be difficult and often impossible for recipients of Title X funding to continue to counsel about and refer for abortion even with their non-Title X funds. *See infra* Point II(A)(2).

The impact of the regulations on the women and communities that Congress sought to serve will be severe, a fact not disputed by the Secretary and accepted as true by both the district court, (10a), and the court of appeals, (41a). Some patients will construe the required silence of their Title X physician on the subject of abortion as a message that abortion is neither medically indicated nor appropriate for them. Sammons ¶ 16 (721-22A). Misled by their Title X physician, these women may not seek further counseling and thus will never learn that they have other, sometimes more appropriate, options. Merrens ¶ 17 (641A). For women with AIDS, diabetes, and other diseases that may be aggravated by continued pregnancy, the impact will be particularly severe.

Rosenfield ¶¶ 9-15 (680-84A); Minkoff ¶¶ 7-9 (647-48A); Morley ¶ 17 (664A); Merrens ¶ 17 (641A). Some women will carry unwanted pregnancies to term, with lifelong and often devastating consequences. Morley ¶ 16 (663-64A); Rust ¶ 13 (703-04A); P. Roe ¶ 3 (96a); L. Roe ¶ 5 (97a).

Even those women who seek further information about abortion will have to call provider after provider on the referral list until they stumble upon one that provides abortions or referrals. Some women, particularly teens, may be completely deterred by the frustration of runaround referrals.[13] M. White ¶ 6 (93-94a); Morgan ¶ 8 (86a); Klepper ¶ 20 (Feb. 5, 1988); Bennett ¶ 21 (501A). Those who find an abortion provider will have experienced substantial delay. Merrens ¶¶ 16-17 (640-41A). For some women, delay will eliminate the abortion option, Morley ¶ 13 (662-63A), while for others the delay will increase associated medical risks and costs.[14] *E.g.*, Gordon ¶ 12 (590A); Henshaw ¶¶ 16, 21 (601, 603-04A). In sum, by requiring the provision of incomplete and misleading information to patients relying exclusively on government-subsidized health care, the regulations will leave many women worse off than if there had been no Title X program at all. Katz ¶ 18 (624A); *see also* Pasternack ¶ 14e (674A); Potteiger ¶ 18 (91a).

B. History of the Litigation

Petitioners initiated this action on February 2, 1988. The complaint, which asserted jurisdiction under 28 U.S.C. §§ 1331, 1343, 1361 (1982) and 5 U.S.C. §§ 702, 704 (1982), stated claims for relief under Title X, the Administrative Procedure Act, and the First and Fifth Amendments to the United States Constitution. On February 19, the district court granted petitioners' motion for a preliminary injunction, *New York v. Bowen*, Nos. 88-0701, 0702 (S.D.N.Y.) (order dated Mar. 1, 1988) (427-28A), but on June 30, the court granted summary judgment in favor of the Secretary and dismissed the complaint, (9-33a). Notwithstanding the district court's decision, the Secretary voluntarily extended petitioners' Title X funding under the terms of the preexisting regulations until early in the fall of 1989. Pine ¶¶ 4-8 (Nov. 13, 1989). Petitioners then moved for an injunction pending decision by the Second Circuit, which was granted on September 5, 1989. (33-34a).

13 Some of these women will turn to unlicensed providers or attempt self-abortion. *E.g.*, Rust ¶¶ 11, 15 (92a). Others, particularly teenagers, may run away from home to conceal pregnancies or may become suicidal. Morgan ¶ 8 (86-87a). One program reported frequent referrals of teens by a local suicide prevention counseling service. Potteiger ¶ 9 (Dec. 15, 1987). Most of those teens, after counseling about available options, chose to terminate their pregnancies. *Id.*

14 For example, the mortality risk for abortion rises 50% each week after the eighth week of pregnancy while the risk of major complications increases by approximately 30% each week. Morley ¶ 12 (79a).

On November 1, 1989, a divided court of appeals affirmed the district court decision. The opinion of the court construed the statutory prohibition on the use of Title X funds for the performance of abortion to "specifically exclude[ ]" informational speech about abortion as well. (49a). The court disregarded contemporaneous and subsequent legislative history indicating a contrary interpretation of the Act, (48-50a), as well as the contemporaneous and longstanding HHS view that Title X permitted and even required such counseling and referral, (50-51a). The court did not address the claim that the regulations are arbitrary and capricious. (53a). Finally, the court concluded that the regulations do not impermissibly infringe on speech, (56-59a), or privacy, (53-56a), because they are only a condition on the receipt of government funds, (53-59a). It found "constitutionally irrelevant" the fact that the regulations "impair and impede" women's exercise of their rights. (55a). The court failed to address arguments that the regulations impermissibly burden nonfederally funded speech and that they are void for vagueness.

The concurring and dissenting judges were, however, deeply troubled by the impact of the regulations on the Title X doctor-patient relationship. Both judges found the regulations to interfere with the patient's informed choice about pregnancy and to create a risk of serious health consequences for those relying on Title X physicians. (Cardamone, J., con-

curring) (61-62a);[15] (Kearse, J., dissenting) (65-66a). Judge Cardamone concurred in the judgment although he found that the regulations "fall woefully short of the tolerant spirit that gave birth to and should continue to animate our constitutional system." (62a). Judge Kearse, in dissent, concluded that the regulations discriminate on the basis of viewpoint, (63-64a), interfere with a woman's right to choose whether to have an abortion, (65a), and are "arbitrary and capricious" because the Secretary's "about-face" was neither required by the statute nor justifiable, (66-67a).

On November 21, 1989, the Second Circuit unanimously enjoined enforcement of the regulations and stayed its mandate pending disposition of the case by this Court. (68-69a). Thus petitioners continue to receive grant funds under the terms of the preexisting regulations.

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS A SIGNIFICANT CONSTITUTIONAL QUESTION ABOUT THE EXTENT TO WHICH THE FEDERAL GOVERNMENT MAY CURTAIL SPEECH AND INFORMATION ABOUT ABORTION IN A FEDERALLY FUNDED PUBLIC HEALTH PROGRAM.

This case presents a significant question whether the Constitution permits the federal government to both censor and compel speech within a federally subsidized doctor-patient dialogue in order to steer women, indiscriminately, toward childbirth over abortion. This question was neither addressed nor resolved in *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989), in which the only speech issue presented to this Court was dismissed as moot. *Id.* at 3053-54; *id.* at 3060 (O'Connor, J., concurring). Similarly, the issue was not

15 Judge Cardamone noted that the regulations were "crafted" to "constitute a trap for the mostly unsophisticated and unwary patients, and [to] jeopardize[ ] the ability of Title X physicians to safeguard the health of those seeking their expert advice." (footnote omitted) (61a).

resolved by this Court's summary affirmance in *Babbitt v. Planned Parenthood*, 479 U.S. 925 (1986).[16] Finally, neither *Harris v. McRae*, 448 U.S. 297 (1980), nor *Maher v. Roe*, 432 U.S. 464 (1977), involved First Amendment challenges to restrictions on speech.[17]

The issue posed by this case not only "has not been, but should be, settled by this Court." Sup. Ct. R. 10.1(c). As this Court has recently recognized, important and "complicated" issues arise when government both subsidizes and regulates the speech of professionals. *See University of Pa. v. EEOC*, 110 S. Ct. 577, 587 n.6 (1990) (citing *Meese v. Keene*, 481 U.S. 465, 484 (1987)). Yet, with increasing frequency, government has sought to adopt this dual role, particularly with regard to matters of sexuality, reproduction, and abortion.[18] Indeed, in its brief urging that probable jurisdiction be

16 In *Babbitt*, the Ninth Circuit had held that Arizona's ban on abortion counseling and referral in state-funded programs was constitutional as applied to the use of state funds, *Planned Parenthood v. Arizona*, 718 F.2d 938, 944 (9th Cir. 1983) (*Planned Parenthood I*), but unconstitutional as applied to the use of non-state funds. *Planned Parenthood v. Arizona*, 789 F.2d 1348, 1351 (9th Cir.) (appeal after remand) (*Planned Parenthood II*), *aff'd sub nom. Babbitt v. Planned Parenthood*, 479 U.S. 925 (1986); *see generally Planned Parenthood I*, 718 F.2d at 944-46. Because this Court summarily affirmed the Ninth Circuit in an appeal from *Planned Parenthood II*, the conditional cross-appeal challenging the holding in *Planned Parenthood I* was dismissed. *See* 479 U.S. 925 (1986).

17 The questions presented were limited to religious freedom and equal protection in *Harris*, 48 U.S.L.W. 3546 (U.S. Feb. 19, 1980) (No. 79-1268), and to equal protection in *Maher*, 45 U.S.L.W. 3062 (U.S. July 27, 1976) (No. 75-1440).

18 *See* Adolescent Family Life Act of 1981, 42 U.S.C. § 300z-10(a) (1988) (forbidding award of funds to programs that counsel or refer for abortion); Standard Provisions for U.S. Nongovernmental Grantees, *reprinted in* U.S. Agency for Int'l Dev., 13 AID Handbook, June 19, 1987 (implementing Policy Statement of the United States of America at the United Nations International Conference on Population (2d Sess.), Mexico, Aug. 6-13, 1984 (governing grants made pursuant to the Foreign Assistance Act of 1961, 22 U.S.C. § 2151 (1988)) (prohibiting domestic nongovernmental organizations receiving AID funds from assisting foreign nongovernmental organizations that provide information about the availability and bene-

noted in *Webster*, the United States argued that the speech issues in that case were "substantial" and should be resolved through "plenary consideration" because summary affirmance would leave uncertain the legality of the Title X regulations at issue herein. Brief for the United States as *Amicus Curiae* Supporting Appellants at 6, 10-11, *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040 (1989) (No. 88-605).

Finally, resolution of this case will have important practical as well as constitutional ramifications. At issue are regulations governing a program with an annual budget approaching $200 million that funds nearly 4000 clinics affecting upwards of five million women nationwide. The legality of the regulations remains hotly disputed and their enforcement against the vast majority of grant recipients has thus far been enjoined.[19] Absent a decision by this Court, the validity of the Title X program will remain uncertain and uneven enforcement could result.[20]

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fits of abortion)). Such restrictions on funded health consultations and information are not unique to the abortion context. Centers For Disease Control funds for AIDS education may not be used for counseling or education "designed to promote or encourage, directly, homosexual or heterosexual sexual activity or intravenous drug use." Health Omnibus Programs Extension Act of 1988, Pub. L. No. 100-607, § 221, 1988 U.S. Code Cong. & Admin. News (102 Stat.) 3093.

19 *See Planned Parenthood Fed'n of Am. v. Bowen*, 680 F. Supp. 1465 (D. Colo. 1988) (preliminary injunction), 687 F. Supp. 540 (D. Colo. 1988) (permanent injunction), *appeal pending*, No. 88-2251 (10th Cir.) (oral argument held May 11, 1989); *Massachusetts v. Bowen*, 679 F. Supp. 137 (D. Mass. 1988) (permanent injunction), *aff'd*, No. 88-1279 (1st Cir. May 8, 1989), *vacated and withdrawn, reh'g en banc granted*, 873 F.2d 1528, No. 88-1279 (1st Cir. Aug. 9, 1989) (*en banc* oral argument held Dec. 5, 1989).

20 Should certiorari be denied in the instant case, petitioners will lose the protection of their injunction. (68-69a). Irreparable harm will result because the Secretary has made plain his intention to enforce the regulations, even if he may do so only temporarily and only in New York. *See generally* Defendant-Appellee's Declaration in Opposition to Plaintiff-Appellants' Motion for an Injunction Pending Review on Writ of Certiorari, *New York v. Sullivan*, 889 F.2d 401 (2d Cir. 1989) (Nos. 88-6204, 6206).

II. THE SECOND CIRCUIT'S HOLDING THAT THE CHALLENGED REGULATIONS ARE CONSTITUTIONAL IS INCONSISTENT WITH THE DECISIONS OF THIS COURT.

A. The Second Circuit Erred in Holding that Regulations 59.8, 59.9, and 59.10 Do Not Violate the First Amendment.

1. Sections 59.8 and 59.10 impermissibly discriminate on the basis of viewpoint so as to suppress information about abortion.

In finding that the regulations constitute a permissible decision by the government not to "subsidize the exercise of fundamental . . . speech rights," (56a), the Second Circuit ignored this Court's repeated admonition that government may not "discriminate invidiously in its subsidies in such a way as to 'ai[m] at the suppression of dangerous ideas.' " *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 548 (1983) (quoting *Cammarano v. United States*, 358 U.S. 498, 513 (1959)); *see also Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 811-13 (1985). These regulations do exactly that.

First, contrary to the holding of the Second Circuit, (59a), §§ 59.8 and 59.10 are facially viewpoint discriminatory. Section 59.8 prohibits speech about abortion while requiring speech about the "opposite" treatment choice for pregnancy. Thus, Title X providers "may not" counsel about or refer for abortion, § 59.8(a)(1), (3a), even upon request, and if asked about abortion are obliged to tell patients that "the project does not consider abortion an appropriate method of family planning," § 59.8(b)(5), (5a). At the same time, Title X providers are compelled to refer pregnant women to prenatal care providers that "promote the welfare of . . . [the] unborn child," § 59.8(a)(2), (3a), and to provide "information necessary to protect the health of . . . [the] unborn child," *id.* Section 59.10 reflects a similar bias. That section requires Title X providers to refrain from speech that advocates, encourages, or promotes legal abortion; however,

speech discouraging or opposing abortion is not similarly prohibited. (6-7a).

Because these regulations do not treat speech about competing pregnancy options in an evenhanded fashion, they invidiously discriminate on the basis of viewpoint. *See Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 230 (1987) (" 'The First Amendment's hostility . . . extends . . . to restrictions on particular viewpoints . . . .' ") (citation omitted); *id.* at 237 (Scalia, J., dissenting) (noting the necessity of "a . . . stringent prophylactic rule . . . when the subsidy pertains to the expression of a particular viewpoint").[21] *See also Pacific Gas & Elec. v. California Pub. Util. Comm'n*, 475 U.S. 1, 15 (1986).

Second, because the Secretary apparently regards abortion as a "dangerous idea[ ]," *Cammarano*, 358 U.S. at 513, the regulations have both the purpose and the effect of suppressing speech about this disapproved subject. Within the Title X program, this suppression is achieved by employing the Title X funded physician as a spokesperson for government views and by censoring information regarding the disfavored medical choice of abortion that is conveyed to reliant, if not captive, listeners.[22] Katz ¶ 7 (84a); Morgan ¶ 6 (86a); Felton

21 Moreover, the Title X program differs from the tax exemptions analyzed in *Ragland* and *Regan* in an important respect: Title X was enacted with the express purpose of "designat[ing] . . . a place [for] or channel of communication," *Cornelius*, 473 U.S. at 802, between health care personnel and the public on subjects of family planning and reproductive health. *See* 42 U.S.C.A. § 300 historical note (West 1982) (one purpose of Title X was to make "readily available information . . . on family planning and population growth to all persons") (71a). The question whether a subsidy program such as Title X should be analyzed as a "limited" or "designated" public forum, *see Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 & n.7 (1983); *Cornelius*, 473 U.S. at 802, rather than as a subsidy scheme of the sort analyzed in *Regan*, has not previously been considered by this Court.

22 If government may limit protected speech to shield a "captive" audience, *see, e.g., Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), surely it cannot amplify its own voice to the exclusion of others by exploiting the "captivity" of intended listeners. *See, e.g., New York City Unemployed*

¶ 13b (88a). The inequality of knowledge between doctor and patient, together with the dependence of patients on their Title X health professionals, *see supra* Statement of the Case (A), renders these regulations a devastatingly effective means of suppressing the "idea" of abortion in the minds of the low-income women served by the program.[23]

Moreover, §§ 59.9 and 59.10 will have the further effect of suppressing information about abortion in the communities served by Title X. Section 59.9 will prevent many clinics receiving Title X funds from being able to provide informa-

& Welfare Council v. Brezenoff, 742 F.2d 718, 722 (2d Cir. 1984) (finding welfare recipients to be "captive" at office in which checks are received). This is particularly true in the context of a medical consultation. An indigent woman seeking medical information from her Title X physician is in effect "captive" because she desperately needs the information and often has nowhere else to go. *See, e.g.*, Coombs ¶ 11 (86a). The "captivity" and dependency that characterize this doctor-patient relationship change the action challenged herein from a permissible introduction of government's voice in the "marketplace of ideas" to an impermissible means of skewing the medical information available in the only "marketplace" in which low-income women can obtain advice and counsel regarding a pregnancy choice. The latter approaches indoctrination. *See Texas v. Johnson*, 109 S. Ct. 2533, 2546 (1989) (state may not "prescribe what shall be orthodox" and impose its "political preferences" on "the citizenry"); *Tinker v. Des Moines Community School Dist.*, 393 U.S. 503, 511 (1969) ("[S]tudents may not be regarded as closed-circuit recipients of only that which the State chooses to communicate.").

23 Such suppression is contrary not only to the principles of *Regan* and *Cammarano*, but also to the legal and ethical imperatives that govern the doctor-patient dialogue. *See generally University of Pa. v. EEOC*, 110 S. Ct. 577, 587 (1990) (discussing First Amendment protection against content-based infringement of "faculty's professional judgment" in a university context). Doctors in New York, as in a majority of states, risk liability for failure to provide patients with complete information as to their medical options. Randolph ¶ 3 (77a); Gesche ¶ 15 (75-76a); Rosenfield ¶ 9 (680-81A); Morley ¶ 21 (80a). Moreover, the professional standards of the American Medical Association ("AMA") and the American College of Obstetricians & Gynecologists ("ACOG") require doctors to provide full, unbiased information about and referral for all medical alternatives, *see generally* Sammons (80-82a); Morley (78-80a), even those they are unwilling or unable to provide. Katz ¶ 10 (84a); Cohen ¶ 5 (509A). Compliance with the Title X regulations will thus place doctors at risk of legal liability and professional censure.

tion about abortion even with non-Title X funds. *See infra* Point II(A)(2). Because many communities currently served by Title X have no other comparable provider of reproductive health care and information, *see, e.g.*, Randolph ¶¶ 10, 12, 14, 18 (Nov. 13, 1989); Coombs ¶ 11 (86a), the inability of programs that receive Title X funds to offer abortion information even with other monies will leave these communities without such information. Finally, because the provision of information about abortion will in some cases "promote" or "encourage" that choice, § 59.10 will prohibit Title X projects from disseminating literature and offering community education programs that include neutral information about abortion. *See supra* Statement of the Case (A).[24]

In these ways, the regulations "rais[e] a reasonable danger that the idea [of abortion as an available option] will be 'drowned out.' " *Student Gov't Ass'n v. Board of Trustees*, 868 F.2d 473, 479 n.4 (1st Cir. 1989); *see also Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040, 3052 n.8 (1989). Where, as here, the government effectively monopolizes the sources of medical information upon which entire communities rely, a viewpoint discriminatory subsidy scheme impermissibly suppresses speech.

2. The requirement of § 59.9 that Title X programs be physically separate from programs providing abortion information impermissibly burdens speech funded by sources other than Title X.

The requirement that the Title X program be *physically* as well as financially separate from counseling and education about, referral for, and performance of abortion impermissibly burdens expression *not* funded by Title X. Clinics lack

24 The vagueness of the prohibitions against "encouraging," "counseling," or "advocating" abortion, as well as of the requirement of "physical separat[ion]," will further chill speech about abortion. *See City of Lake Wood v. Plain Dealer Publishing Co.*, 108 S. Ct. 2138, 2144 (1988) (unfettered discretion "intimidates parties into censoring their own speech"). Although the Second Circuit did not address the question of vagueness, the issue was fully briefed and thus preserved for review.

the resources to locate, furnish, and establish a separate facility, or to sustain such a facility with the ongoing costs of duplicative staff, administration, and maintenance that would entail. *See, e.g.*, Fink ¶ 13 (85a); Tiezzi ¶ 8e (94-95a); Drisgula ¶ 27 (90a). Thus, the vast majority of Title X clinics will have to cease *all* speech about abortion, even that funded by other sources, in order to remain recipients of Title X monies.

Moreover, for those clinics that can afford to comply, the separation requirement will constrain their ability to freely allocate scarce resources, *see, e.g.*, Felton ¶ 14 (530A); Pasternack ¶ 15 (675A), and to implement an innovative and respected health care philosophy favoring the integration of family planning, prenatal, and adoption services into a single coordinated program.[25] Because § 59.9 constrains critically expressive choices, it impermissibly impinges upon protected speech. *Cf. Buckley v. Valeo*, 424 U.S. 1, 19-20 (1976) (finding that limitations on expenditures burden expression).[26]

This Court has repeatedly held that government may not condition benefits or subsidies on the relinquishment of a constitutional right. *See Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *see also Speiser v. Randall*, 357 U.S. 513, 518-19 (1958).[27] Because § 59.9 operates to severely burden the Title

25 This philosophy, for which several Title X recipients are well-known, *see, e.g.*, M. White ¶¶ 2-3 (Dec. 15, 1987); Bennett ¶ 24 (502A), has proven to be especially effective for teenagers, who frequently do not pursue referrals. Morgan ¶ 8 (86-87a); M. White ¶ 6 (93-94a); Klepper ¶ 20 (Feb. 5, 1988).

26 By defining "Title X project funds [to] include all funds allocated to the Title X program, including but not limited to grant funds, grant-related income or matching funds," (2a), § 59.2 also impermissibly burdens Title X recipients' constitutionally protected activities. Because the prohibitions of §§ 59.8 and 59.10 against counseling about, referral for, and advocacy of abortion apply to all "Title X project funds" as defined in § 59.2, the regulations explicitly condition funding on the cessation of protected speech about abortion that is *not* funded by Title X.

27 Statutes prohibiting the distribution of state funds to programs that provide abortion counseling, even with private funds, consistently have been held to impermissibly condition benefits on the relinquishment of constitutional rights. *See Planned Parenthood v. Arizona*, 718 F.2d 938 (9th Cir. 1983), *appeal after remand*, 789 F.2d 1348 (9th Cir.), *aff'd sub nom. Babbitt*

X recipient's "us[e of] even wholly private funds to finance its [speech] activity," it violates the First Amendment. *FCC v. League of Women Voters*, 468 U.S. 364, 400 (1984). *See also FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 255 (1986) (plurality) (finding unconstitutional separation requirements so onerous that they were likely to "discourage protected speech").[28] *Cf. First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 785-86 (1978) (government may not advance some viewpoints by burdening the expression of others); *Buckley*, 424 U.S. at 48-49 (same).

Finally, there is no showing that *physical* separation is necessary to prevent government funding of speech about abortion. *See generally Massachusetts v. Bowen*, 679 F. Supp. 137, 142 (D. Mass. 1988) (summarizing evidence showing no need for physical separation); *see also New York v. Sullivan*

v. Planned Parenthood, 479 U.S. 925 (1986); *Planned Parenthood Ass'n v. Kempiners*, 531 F. Supp. 320 (N.D. Ill. 1981), *vacated and remanded on other grounds*, 700 F.2d 1115 (7th Cir. 1983), *on remand*, 568 F. Supp. 1490 (N.D. Ill. 1983); *Valley Family Planning v. North Dakota*, 489 F. Supp. 238 (D.N.D. 1980), *aff'd on other grounds*, 661 F.2d 99 (8th Cir. 1981).

28 Unlike the restriction on lobbying found constitutional in *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 544 n.6 (1983) (requiring "only" separate incorporation and record-keeping for organization to continue its otherwise prohibited activities), the requirement of physical separation as a condition of continued speech about abortion is so burdensome as to make Title X grant recipients "unable to operate with the dual structure." *Id. Cf. FCC v. League of Women Voters*, 468 U.S. at 400 (suggesting that FCC's ban on editorializing might have withstood scrutiny if physical separation were not required because an affiliate organization could then "use the station's facilities to editorialize"). The separation requirement at issue here is further distinguished from that in *Regan* because § 59.8's prohibition of referrals for abortion, in many instances, will operate to bar Title X programs from referring pregnant patients to their physically separate "affiliates" for either abortions or abortion information. § 59.8(a)(3), (3a). Because the two entities will not be able to work in tandem, the First Amendment problems are "insurmountable." *See Regan*, 461 U.S. at 553 (Blackmun, J., concurring) (emphasizing First Amendment problem "[s]hould the IRS attempt to limit the control these organizations exercise over the lobbying of their § 501(c)(4) affiliates"). Because § 59.9 does not provide a viable separation option of the sort found in *Regan* and suggested in *FCC*, it impermissibly burdens the speech of Title X recipients.

(Kearse, J., dissenting) (66a). Accordingly, the Second Circuit's failure to find § 59.9 unconstitutional is inconsistent with the precedent of this Court.

B. The Second Circuit Erred in Holding that These Regulations Do Not Violate the Right of Privacy.

Looking to *Maher v. Roe*, 432 U.S. 464 (1977), *Harris v. McRae*, 448 U.S. 297 (1980), and *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989), the Second Circuit dismissed plaintiffs' privacy claims. (53-56a). The court reasoned that restrictions on the availability of public resources for the *performance* of abortions present a greater impediment to women's exercise of their privacy rights than do restrictions on *speech* about abortion in a doctor-patient consultation. (55a). This conclusion ignores the factual record. Because these regulations require the provision of misinformation, they do more than encourage childbirth. Rather, they constitute a "direct state interference with a protected activity," *Maher*, 432 U.S. at 475, and do not, as in *Harris*, leave an indigent woman no worse off with regard to her "range of choice . . . [than] if Congress had chosen to subsidize no health care costs at all." *Harris*, 448 U.S. at 317.

Although government need not subsidize or facilitate the exercise of a right, it nonetheless may not interfere with that right. The record in this case establishes that these regulations affirmatively interfere with choice. Women who have come to rely on Title X for medically sound advice will be misled by the incomplete information and biased referral lists that must be provided under the new regulations.[29] The silence of a trusted doctor on the subject of abortion will lead many women to believe that abortion is not an appropriate or medically indicated option for them. Merrens ¶ 17 (641A); *see also* Morley ¶ 17 (664A); Sammons ¶ 8 (81a). Inappropriate referrals will result in delay for many women seeking an

29 The Second Circuit unanimously concluded that the regulations "may hamper or impede women in exercising their right of privacy in seeking abortions." (Winter, J.) (55a); (Cardamone, J., concurring) (61-62a); (Kearse, J., dissenting) (64-66a).

abortion, a result with serious health consequences.[30] *See, e.g.*, Morley ¶¶ 12-13 (79a); Cohen ¶ 3 (89a). Moreover, the inability of providers to counsel women for whom abortion may be medically indicated, such as those with AIDS, will have particularly serious consequences. *See, e.g.*, Sammons ¶ 8 (81a); Morley ¶ 17 (664A); Joseph ¶¶ 6-7 (Nov. 9, 1989).

This Court has considered the constitutionality of intrusions into the doctor-patient dialogue with special care. *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 759, 762 (1986); *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 429-30, 443-45 (1983). The funded nature of the dialogue at issue here cannot justify the wholesale suspension of these basic principles. *See also supra* Point II(A)(1).

III. THE SECOND CIRCUIT'S CONCLUSION THAT THE CHALLENGED REGULATIONS ARE A PERMISSIBLE EXERCISE OF THE SECRETARY'S AUTHORITY PRESENTS IMPORTANT, UNSETTLED QUESTIONS OF LAW AND IS INCONSISTENT WITH THE DECISIONS OF THIS COURT.

A. The Second Circuit's Interpretation of Title X in a Manner at Odds with Its Overall Language and Purpose Presents a Significant Issue Necessitating Resolution by this Court.

The Second Circuit concluded that § 1008 "specifically excludes" counseling and referral for abortion from the scope of Title X services. (49a). In so concluding, the court failed to follow established dictates of statutory construction. Because the Second Circuit's misinterpretation of the Act will affect the lives and health of the millions of women dependent on the program, this case presents an issue that should be resolved by this Court. *See* Sup. Ct. R. 10.1(c).

30 As this Court has previously held, government-imposed delay impermissibly burdens a woman's right to choose abortion. *See, e.g., City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 450-51 (1983).

While the Second Circuit correctly made the plain language of the statute its "starting point," *Hallstrom v. Tillamook County*, 110 S. Ct. 304, 308 (1989) (quoting *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)), it failed to read the statutory provision in a manner consistent with "ordinary usage." *See Green v. Bock Laundry Mach. Co.*, 109 S. Ct. 1981, 1994 (1989) (Scalia, J., concurring); *see also Mississippi Band of Choctaw Indians v. Holyfield*, 109 S. Ct. 1597, 1608 (1989). The plain language of § 1008 refers only to "abortion" and does not exclude abortion counseling and referral from the broad scope of Title X funded services.[31] Contrary to the reasoning of the Second Circuit, (47a), programs providing abortion counseling and referral are not by definition "programs where abortion is a method of family planning" within the meaning of § 1008 of the Act. There is no evidence that Title X providers have ever counseled pregnancy termination as a "family planning" option equivalent to diaphragms, intrauterine devices (IUDs), oral contraceptives, and other pregnancy prevention options.[32] Instead, Title X programs, like all high quality providers of reproductive health services, treat abortion as a backup to contraceptive or human failure and as an option when pregnancy termination is medically indicated. *E.g.*, Felton ¶ 13a (528A); *see also* Rust ¶ 17a (92-93a); Tiezzi ¶ 8a (94a). The Second Circuit's construction of § 1008 thus departs from the "ordinary usage" of the term "method of

31 "[T]he enumeration of specific exclusions from the operation of a statute is an indication that the statute should apply to all cases not specifically excluded." *In re Cash Currency Exch., Inc.*, 762 F.2d 542, 552 (7th Cir. 1985); *see Andrus v. Glover Constr. Co.*, 446 U.S. 608, 617 (1980) ("additional exceptions not to be implied"); *see also American Bank & Trust Co. v. Dallas County*, 463 U.S. 855, 864 (1983).

32 The ordinary meaning of the term "family planning" does not extend to abortion. *See Webster's Ninth New Collegiate Dictionary* 448, 154 (1986) (defining "family planning" as a means of spacing children through a "method[ ] of birth control," a term defined as a means of "preventing or lessening the frequency of conception"); *see also* J. Pritchard, P. MacDonald & N. Gant, *Williams Obstetrics* 467-90, 811-36 (17th ed. 1985) (Chapter 24 is entitled "Abortion" while Chapter 40, entitled "Family Planning," addresses methods of contraception).

family planning" in the reproductive health field, as well as from the Secretary's longstanding view. *See infra* Point III(B).[33]

Moreover, the Second Circuit's reading of § 1008 fails to comport with the "object and policy" of the Title X statute,[34] *see Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987) (quotations and citations omitted), as evidenced in its legislative history. *See also Hallstrom*, 110 S. Ct. at 310; *Public Citizen v. United States Dep't of Justice*, 109 S. Ct. 2558, 2566 (1989); *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 123-25 (1987). The purpose of Title X was to establish a high quality public health program, specializing in family planning, and thereby to equalize the opportunity of poor women to make reproductive choices. *See, e.g.*, H.R. Rep. No. 1472, 91st Cong., 2d Sess. 7, *reprinted in* 1970 U.S. Code Cong. & Admin. News 5074 (252A). Because Congress was aware that Title X would be

33 Indeed, the Second Circuit's reading of the statute amounts to a somewhat belated proclamation that for 17 years HHS operated the much lauded Title X program in patent violation of its authorizing statute, a result that is difficult to fathom. This Court has not hesitated to set aside such a reading of a statute in favor of one that comports with common sense and congressional intent. *E.g.*, *Public Citizen v. United States Dep't of Justice*, 109 S. Ct. 2558, 2566 (1989); *Bock Laundry*, 109 S. Ct. at 1984-85; *id.* at 1994 (Scalia, J., concurring); *id.* at 1995 (Blackmun, J., dissenting). *See Missouri v. Jenkins*, 109 S. Ct. 2463, 2470 (1989).

34 The Second Circuit's construction of § 1008 is also incompatible with "the surrounding body of law into which the provision must be integrated." *Bock Laundry*, 109 S. Ct. at 1994 (Scalia, J., concurring); *K Mart Corp. v. Cartier, Inc.*, 108 S. Ct. 1811, 1817 (1988); *Bethesda Hosp. Ass'n v. Bowen*, 485 U.S. 399, 405 (1988). Title X authorizes the Secretary "to make grants . . . and enter into contracts . . . to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of *acceptable* and effective family planning methods *and services* . . . ." 42 U.S.C. § 300(a) (1982) (emphasis added) (1A). It is difficult to reconcile this language with an administrative requirement that grantees provide care in a manner that is *unacceptable* in the view of the AMA, ACOG, and others. *See, e.g.*, Sammons ¶¶ 4, 8 (81a); Morley ¶¶ 18, 19, 21 (79-80a). *See also* Gesche ¶ 15 (76a); Randolph ¶ 3 (discussing New York laws requiring informed consent) (77a); Katz ¶¶ 6-8 (discussing common law obligation of information disclosure) (83-84a).

the only source of medical care for some women, the services it provided, whether directly or by referral, were to be "broad." *See* 42 U.S.C. § 300(a) (1A).[35] "[R]eferral to other [non-funded] medical services as needed" was considered an essential component of the Title X program and not excluded by § 1008. S. Rep. No. 1004, 91st Cong., 2d Sess., *reprinted in* 116 Cong. Rec. 24,096 (1970) (70a).[36]

Finally, the Second Circuit's interpretation of § 1008 must be rejected because it violates the principle that "every reasonable construction must be resorted to, in order to save [the] statute from unconstitutionality," *Hooper v. California*, 155 U.S. 648, 657 (1895), *quoted in Debartolo v. Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988); *see, e.g., Frisby v. Schultz*, 108 S. Ct. 2495, 2501 (1988), and because the court's holding "engenders constitutional issues" that should be avoided if possible. *Gomez v. United States*, 109 S. Ct. 2237, 2241 (1989); *see Public Citizen*, 109 S. Ct. at 2572.

35 The Conference Report specifically stated that, in addition to "preventive family planning services," Title X was to fund "other related medical, informational, and educational activities." H.R. Conf. Rep. No. 1667, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Admin. News 5080, 5081-82 (70a); *see also* 42 U.S.C.A. § 300 historical note (West 1982) (70-71a) (declared purpose of Act includes making available "comprehensive" services as well as "educational materials . . . on family planning and population growth . . . ."); S. Rep. No. 1004, 91st Cong., 2d Sess., *reprinted in* 116 Cong. Rec. 24,095-96 (1970) (70a) ("family planning [is not] merely a euphemism for birth control" and "should consist of much more than the dispensation of contraceptive devices"). *See generally supra* Statement of the Case (A).

36 The Second Circuit's conclusion as to § 59.9 is also at odds with congressional intent. The separation requirement undermines Congress' intent that Title X be an integral part of a broader health care system and not "interfere with or limit programs conducted in accordance with State or local laws and regulations which are supported" with non-Title X funds. H.R. Conf. Rep. No. 1667, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Admin. News 5080, 5082. (70a). Consistent with this intent, HHS had previously interpreted § 1008 not to require physical separation between activities prohibited and permitted under Title X as construed by the agency. *See* Memorandum from Joel M. Mangel, Deputy Assistant General Counsel, to Louis M. Hellman, M.D., Deputy Assistant Secretary for Population Affairs (Apr. 20, 1971) (concluding that hospital receiving Title X funds may provide abortions on same premises) (74a).

B. The Second Circuit's Decision Presents a Serious Question as to the Proper Degree of Deference To Be Accorded an Agency Reinterpretation of Its Authorizing Statute.

This Court has emphasized the deference due to an agency's construction of its authorizing statute, *see Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984), so long as that construction is not at odds with the language or structure of the statute. *See Public Employees Retirement Sys. v. Betts*, 109 S. Ct. 2854, 2863 (1989); *Etsi Pipeline Project v. Missouri*, 484 U.S. 495, 516-17 (1988).[37] Such deference is due particularly when the agency interpretation is contemporaneous with the statute's enactment, *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 124 n.20 (1987); *BankAmerica Corp. v. United States*, 462 U.S. 122, 130 (1983), and remains consistent over a long period of time, *see NLRB*, 484 U.S. at 124 n.20; *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987).

In this case, HHS first construed Title X when it promulgated the original regulations governing applications, grants, and programs administered pursuant to the Act. These regulations required Title X funded programs to make "necessary referral[s] to other medical facilities," 36 Fed. Reg. 18,465, 18,466 (1971) (§ 59.5(d)) (789A); *id.* at 18,466 (§ 59.5(e)) (789A), and reiterated that the only services *not* to be provided were "*abortions* as a method of family planning." *Id.* at 18,466 (§ 59.5(a)(9)) (emphasis added) (789A). Moreover, consistent with the arguments set forth above, *see supra* Point III(A), the agency originally understood § 1008 to be addressed to the practice of treating abortion as an alterna-

37 Recently, this Court again made clear that, even where Congress has delegated authority to the Secretary, regulations that are more restrictive than statutory standards are invalid. *See Sullivan v. Zebley*, 58 U.S.L.W. 4177 (U.S. Feb. 20, 1990).

tive to contraception.[38] Such contemporaneous construction by an agency of its authorizing statute is given "great weight," *BankAmerica*, 462 U.S. at 130, because the agency is "presumed to have been aware of congressional intent" in enacting the law, *National Muffler Dealers Ass'n v. United States*, 440 U.S. 472, 477 (1979), may have been involved in drafting the legislation, *e.g.*, *Rice v. Rehner*, 463 U.S. 713, 730 n.13 (1983), or may have had congressional "oversight and approval" when formulating the initial regulations. *See, e.g.*, *School Bd. v. Arline*, 480 U.S. 273, 279 (1987).

In contrast to the Secretary's contemporaneous interpretation of § 1008, the regulations challenged herein are not due the deference they received from the Second Circuit. First, HHS's recent interpretation of § 1008 abruptly departs from seventeen years of adherence to its contemporaneously developed view.[39] It is therefore " 'entitled to considerably less deference' than a consistently held agency view," *INS*, 480 U.S. at 446 n.30 (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)); *Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 646 n.34 (1986). Second, the agency provided no "good reason

38 In its first report to Congress pursuant to 42 U.S.C. § 300a-6a, the agency stated:

> Within the context of family planning services programs, abortions are not viewed as a method of fertility control but as a service that should be available in accordance with local laws only in the event of a human or contraceptive method failure.

National Center for Family Planning Services, Health Services and Mental Health Administration, Department of Health, Education, and Welfare, *A Five-Year Plan for the Delivery of Family Planning Services* 319 (Oct. 1971) (73a).

39 According to longstanding agency interpretation, § 1008 permitted neutral abortion counseling and referral and barred Title X programs only from affirmatively "promoting," "encouraging," or "advising" patients to have abortions. *See, e.g.*, Letter from Louis M. Hellman, M.D., Deputy Assistant Secretary for Population Affairs, to Hilary H. Conner, M.D., Regional Health Administrator (Nov. 19, 1976) (74a); Memorandum from Carol Conrad, Senior Attorney, Public Health Division, to Elsie Sullivan, Office for Family Planning (July 25, 1979) (105A). Indeed, 1981 HHS Guidelines confirmed that Title X grantees were required to inform pregnant women of all their options—parenting, adoption, and abortion. 1981 Guidelines at § 8.6 (71a).

for the change," *see Robertson v. Methow Valley Citizens Council*, 109 S. Ct. 1835, 1848 (1989); *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983),[40] and did not, as in cases cited by the Second Circuit, *see* 50-51a, rely upon a change in factual circumstances to justify the reversal.[41] Finally, the new regulations do not stem from agency expertise regulating a complex industry according to technical and evolving standards,[42] but are instead a

40 Indeed, a 1982 report found "no evidence that title X funds had been used for abortions or to advise clients to have abortions" or "that any women were . . . encouraged to have abortions." General Accounting Office, *Restrictions On Abortion And Lobbying Activities In Family Planning Programs Need Clarification* (Sept. 24, 1982) (734A). In the absence of such evidence, the agency "about-face" is arbitrary and capricious and therefore not entitled to deference. *See American Hosp. Ass'n*, 476 U.S. at 643; *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 659 (1980); *New York v. Sullivan* (Kearse, J., dissenting) (66a).

41 The Second Circuit relied on two cases for the proposition that an agency rescission or modification may at times be accorded deference. (50-51a). Neither case supports an agency reversal *without* evidence of changed circumstances. *See Motor Vehicles*, 463 U.S. at 42 (agency may adapt rules to "changing circumstances") (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968)); *American Trucking Ass'n, Inc. v. Atchinson, T.S.F. Ry. Co.*, 387 U.S. 397, 416 (1967).

42 Title X does not delegate rule-making authority as part of a "regulatory scheme [that] is technical and complex," *Chevron*, 467 U.S. at 865, and thus uniquely beyond the scope of judicial expertise. *Id. See generally* Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L. Rev. 421, 469 (1987); Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 381-82 (1986). Nor does Title X, as do some authorizing statutes, delegate the authority to promulgate substantive regulations akin to "law." *E.g.*, *Batterton v. Francis*, 432 U.S. 416, 425 & n.9 (1977); *see Continental Air Lines v. Department of Transp.*, 843 F.2d 1444, 1449 (D.C. Cir. 1988) (describing *Batterton* as the "paradigm . . . of an express delegation of legislative power"). *Cf. Zebley*, 58 U.S.L.W. at 4178 n.2 (invalidating regulations promulgated under even such broad rule-making authority); *id.* at 4183 (White, J., dissenting). Instead, Title X delegates to the Secretary only the authority to administer a federal grant program, not the authority to regulate the family planning "industry."

bald new reading of § 1008[43] resulting from a "shift in the political climate." *New York v. Sullivan* (Kearse, J., dissenting) (quoting Transcript of Oral Argument at 52 (Feb. 19, 1988), *New York v. Bowen*, 690 F. Supp. 1261 (S.D.N.Y. 1988) (Nos. 88-0701, 0702) (98a)) (67a); *see also* Letter from Rep. Christopher H. Smith, *et al.*, to Donald T. Regan (Aug. 1, 1986) (98a); Letter from Otis R. Bowen, M.D., to Rep. Vin Weber (Aug. 19, 1986) (99a).

IV. THE SECOND CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF OTHER CIRCUITS.

The holding of the Second Circuit conflicts with the Eighth Circuit's undisturbed conclusion that a ban on counseling about abortion by public employees and in public facilities impermissibly infringes a woman's right to privacy. *See Webster v. Reproductive Health Servs.*, 851 F.2d 1071, 1079-80 (8th Cir. 1988), *rev'd on other grounds*, 109 S. Ct. 3040 (1989).[44] This Court's decision in *Webster* does not invalidate this Eighth Circuit holding, as this Court did not address the circuit's explicit conclusion that, where speech restrictions are at issue, the analyses of *Maher v. Roe*, 432 U.S. 464 (1977), *Poelker v. Doe*, 432 U.S. 519 (1977), and *Harris v. McRae*, 448 U.S. 297 (1980), do not control. *Webster*, 851 F.2d at 1080. *See also Massachusetts v. Bowen*, 679 F. Supp. 137, 146, 147 (D. Mass. 1988) (finding regulations impermissibly "directed at the suppression of one viewpoint" and bur-

43 On "pure" questions of statutory construction, the agency view generally is entitled to little or no deference. *INS*, 480 U.S. at 446; *id.* at 448 (noting that "narrow legal question[s]" of statutory construction are "quite different from the question of interpretation that arises in . . . case[s] in which the agency is required to apply . . . standards to a particular set of facts"). This distinction has been followed by lower courts and endorsed by commentators. *E.g.*, *NLRB Union v. FLRA*, 834 F.2d 191, 198 (D.C. Cir. 1987); *Union of Concerned Scientists v. United States Nuclear Regulatory Comm'n*, 824 F.2d 108, 113 (D.C. Cir. 1987). *See generally* Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 476 (1989); Sunstein, *supra* note 42, at 466, 469; Breyer, *supra* note 42, at 372-82.

44 The State of Missouri did not appeal this holding. *See Webster*, 109 S. Ct. at 3053.

den women's privacy interests), *aff'd*, No. 88-1279, slip op. at 26-43 (1st Cir. May 8, 1989) (finding regulations unconstitutional on speech and privacy grounds), *vacated and withdrawn, reh'g en banc granted*, 873 F.2d 1528, No. 88-1279 (1st Cir. Aug. 9, 1989); *Planned Parenthood Fed'n of Am. v. Bowen*, 680 F. Supp. 1465, 1473-78 (D. Colo. 1988) (holding regulations violate First and Fifth Amendments), *appeal pending*, No. 88-2251 (10th Cir.).

In addition, the Second Circuit's conclusion that § 59.8's prohibition on abortion counseling and referral comports with Title X conflicts with the decision of the Eighth Circuit in *Valley Family Planning v. North Dakota*, 661 F.2d 99, 102 (8th Cir. 1981). In that case, the Eighth Circuit concluded that Title X "mandate[s] that comprehensive health care be provided, including referrals to other services, [such as abortion,] when medically indicated."[45]

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45 *See also Planned Parenthood Fed'n of Am. v. Bowen*, 680 F. Supp. 1465, 1469-72 (D. Colo. 1988) (holding defendant lacked statutory authority to enact challenged regulations), *appeal pending*, No. 88-2251 (10th Cir.); *Massachusetts v. Bowen*, 679 F. Supp. 137, 144 (D. Mass. 1988) (enjoining requirement of physical separation as "counter to congressional policy favoring coordination and integration of health care programs"), *aff'd*, No. 88-1279, slip op. at 13-14 (majority); *id.* at 55-56 (Torruella, J., concurring in relevant part) (finding § 59.9 exceeded statutory authority), *vacated and withdrawn, reh'g en banc granted*, 873 F.2d 1528, No. 88-1279 (1st Cir. Aug. 9, 1989); *Doe v. Pickett*, 480 F. Supp. 1218, 1220 (S.D. W. Va. 1979); *see also Planned Parenthood v. Montana*, 648 F. Supp. 47, 50-51 (D. Mont. 1986) (holding unconstitutional state provision conditioning Title X funds on physical separation between the program and any facility performing abortions).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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